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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 156

FRANCIS D. HOUSTON,
Petitioner

v.

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Francis D. Houston, by his counsel of record, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case.

OPINIONS BELOW

The United States Court of Claims rendered an opinion adverse to the petitioner which is shown on pages 47-54 of the Appendix.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 7, 1962, page 55 of the appendix.

This petition is filed within 90 days from the date of the judgment. Jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATEMENT OF THE FACTS

The petitioner in this case received a probationary appointment as Valuator (506) 53-4 (3) CAF-9 in the Federal Housing Administration in its field office at Honolulu, Hawaii. He subsequently satisfactorily completed his probationary period and obtained the status of a permanent civil service employee of the United States with veterans preference. Effective February 19, 1950, his job position was changed to the title of Appraiser (510) 53-4 (6) GS 1171-9, and on August 17, 1953, a previous promotion of October 12, 1952 was made permanent and the petitioner was given the position and grade of Appraiser (Supervisory) 53-6 (6) GS-1171-11 in the Underwriting Division, Valuation Section at Honolulu, T. H.

On July 8, 1954, based upon his statements contained in a letter of December 29, 1953 to the Administrator Albert M. Cole of the Housing and Home Finance Agency, the petitioner was charged with making accusations against J. Stowell Wright, the Director of the Federal Housing Administration office at Honolulu, T. H., and Mr. George Whisenand, Chief Underwriter of the same office. These accusations were as follows:

"Mr. Wright is unfit to hold his office because—

1) His record during the six years that I know of has been characterized by shameful indolence, gross neglect of duty, incredible gullibility and the exercise of authority in an arbitrary, capricious and abusive manner.

2) He withheld pertinent, substantial and admissible evidence in connection with the investigation of a highly placed federal employee who was suspected of being a dangerous security risk.

3) Mis-use of public funds. This latter is not claimed to come within the legal definition of embezzlement, but rather amounts to the expenditure of public monies via 'slick' maneuvers which on paper comply with the letter of the law, but actually redound to the personal benefit of Mr. Wright and others, and certainly violate the spirit of the law. These clever transactions are common knowledge. They tend to reflect discredit upon the service, destroy the morale of rank and file employees and engender bad public relations, especially in these times when 'economy in government' is being so strongly emphasized at top Washington levels.

4) Over my repeated objections and recommendations and those of realtors, mortgagees and others, Mr. Wright has stubbornly refused to permit the processing of cases involving leasehold estates in accordance with the provisions of the Underwriting Manual. This practice has greatly encouraged speculations and served to speed up an already racing inflation, meanwhile working a hardship on owners of fee simple properties by abetting unfair competition.

5) Ignoring the 'alerts' sounded by the Washington Office anent housing in the vicinity of airports and in complete disregard of the Report of the President's Airport Commission, Mr. Wright approved a site for a huge military housing project (now under construction) in an extremely hazardous location. In fact, it would be difficult to select a more dangerous location if one deliberately set out with a mind to do so."

"As concerns Mr. George Whisenand, Chief Underwriter, I told Mr. Woods that I intended to prove that Mr. Whisenand is unfit to hold his office because he is a liar and a cheat, in addition to being loud, boorish, overbearing, and generally ill-mannered in his dealings with his associates and others.

"Specifically, 1) Mr. Whisenand has authored and conducted a campaign of villification against me, based entirely upon falsehoods, and all stupidly

calculated to excuse his deliberate improper handling of official business involving a huge sum of money. 2) On a recent date Mr. Whisenand knowingly took an examination for promotion which was not properly supervised as required by law."

The petitioner was further charged with making accusations against the said Wright and Whisenand in an interview with a Mr. J. A. Woods, Underwriting Supervisor on or about December 11, 1953. These accusations were as follows:

1) Messrs. Wright and Whisenand are incompetent to execute the functions of the positions which they hold. Mr. Wright is honest but gullible, and Mr. Whisenand is undependable.

2) Mr. Wright had knowledge, and evidence was available to him, that Mr. McCurry was a sexual pervert, but Mr. Wright withheld this information and did not report it to his superiors. This was a dereliction of duty.

3) During a promotion examination, Mr. Whisenand and Mr. Fielder were seated in the Underwriting Section of the office, removed from Mr. John H. Wright, Assistant Director, who was charged with the supervision of the test. Mr. Wright was in another office during the examination listening to a radio. Mr. Whisenand and Mr. Fielder conversed during the examination, and texts, letters of instructions, and information were available to them. Although you did not allege that such information was used by these two gentlemen, you indicated that the conduct during the examination, which was in effect not supervised, was unethical and represented a practice which should have been rejected by responsible individuals.

4) You had determined that you would not continue to work with either Director Wright or Chief Underwriter Whisenand for the reason that you consider them to be liars and cheats."

The petitioner was discharged from his governmental position on August 27, 1954. Thereafter as a veteran

preference eligible he duly appealed to the U. S. Civil Service Commission and fully exhausted any administrative right of appeal he had before that Commission, and an adverse decision was rendered against him on May 8, 1959. In order that this Court may fully understand all of the facts contained in the voluminous record in this case, the following additional facts are stated all of which appear by the record in this case:

In his findings the Regional Director of the Civil Service Commission at San Francisco, California wholly relied upon the investigation report of Woods and this report ante-dated the charges which were filed by the petitioner against the officials in question. It could not have been an investigation of the charges which the petitioner had made against the said officials. Furthermore, Foley, Regional Director of Civil Service Commission, who made the only analysis of the evidence, stated in his opinion that he would not substitute his judgment on certain facts over the opinions and decisions of the officials of the Federal Housing Administration. Further comment will be made on this matter in the reasons for granting the writ.

The Respondent's counsel, in the U. S. Court of Claims, made a motion for a summary judgment which was sustained by the said Court of Claims. There was no consideration of the merits of the petitioner's case in the Court below despite the allegations of arbitrariness and capricious action on the part of the officials concerned with the petitioner's dismissal. Further comment relative to this matter will also be commented upon in the reasons for granting the writ.

The true facts in this case are that McCurry, Director Wright and Chief Underwriter Whisenand against whom petitioner made accusations, were all finally separated from their positions in the Field Office of the Federal Housing Administration. McCurry and Whisenand were

eventually separated on the basis of the evidence which the petitioner had supplied.

The story begins in 1950 when John D. McCurry, construction examiner, was promoted to the key position, Chief Underwriter, in the Honolulu Federal Housing Administration office. The promotion was recommended by J. Stowell Wright, Director of the Honolulu Federal Housing office, and was approved by Mr. Joseph Cassidy, Regional Director, whose office was in Washington, D. C. At that time many people believed McCurry to be a sex-deviate. Early in 1951 Wright was ordered to make an investigation into McCurry's sex life. When making his investigation Wright asked petitioner for information. Petitioner told Wright that he had no factual information, but informed him of a marine, Mr. Green, who did have such information and narrated an incident in which Green complained to petitioner of McCurry's indecent advances toward him, Green. Some time later Wright told petitioner that in his report of investigation he told the Washington office that he had been unable to uncover any evidence indicating that McCurry was a deviate, that was not hearsay or circumstantial. That was an untrue statement because factual information was available to him from the marine, Green. Later, it became apparent that McCurry, as Chief Underwriter, was extending preferred treatment to two former Federal Housing Administration employees, one of whom had participated in the investigation of McCurry.

These two former Federal Housing Administration employees were then representing builders in their business conducted through the Federal Housing Administration office. Petitioner warned Director Wright that there was good reason to believe that McCurry was being blackmailed by those two men. Wright scoffed at the idea. Late in 1952 petitioner returned from two months work on Guam to find that McCurry and George V. Whisenand,

Chief Architect, had been violating Federal Housing Administration underwriting regulations in substantial matters. About February, 1953 petitioner told Wright that he intended to ask the Washington office for an investigation. He told Wright that he intended to report to the investigator on his, Wright's, failure to get a statement from Green concerning the McCurry deviate matter and also of McCurry's and Whisenand's violations of the regulations.

That night Director Wright suffered a nervous breakdown and was disabled for ten days. Feeling compassion for Wright, petitioner unwisely decided to forego a report to Washington, but instead, to take up his complaints with M. Joseph Cassidy, Regional Director, who was expected in Honolulu in a few weeks. Cassidy arrived in Honolulu in June, 1953. At the close of business on the fourth day of his visit, Cassidy grudgingly agreed to permit petitioner to drive him to his hotel. While driving to the hotel Cassidy protested that he was in a hurry to get to the beach before the sun had gone. From his words and demeanor he conveyed the impression that he did not care to spend much time listening to petitioner's complaints. There was no parking space at the hotel, so petitioner continued driving Cassidy, and stopped on a side street. Petitioner then told Cassidy of his numerous complaints, including Wright's failure to contact Green for a statement and McCurry's stealing and altering official documents for the benefit of people outside the Federal Housing Administration office, presumably blackmailers.

The next morning McCurry confessed to Cassidy that he had stolen and altered official documents. After Cassidy returned to Washington McCurry was ordered, via telephone, to resign or face charges. McCurry resigned immediately. Thereupon, Whisenand was moved up to the position of Chief Underwriter. As pointed out before, Whisenand was a party, along with McCurry, to the

wrongdoing in underwriting. McCurry could not have managed the violations of regulations without the help and connivance of Whisenand.

Conditions did not change much under Whisenand. Therefore, petitioner then determined to ask for an investigation. For reasons now obvious, petitioner did not want Cassidy to have anything to do with such investigation. Therefore petitioner wrote to Cassidy (Letter Nov. 12, 1953) asking him to transmit his request for an investigation of the Honolulu Federal Housing Administration office to the Federal Housing Administration Commissioner, Mr. Hollyday. Cassidy did not want Hollyday to select an investigator because he realized that in an honest investigation it would be revealed that he and Wright had knowingly kept a sex-deviate in a key position, exposed to blackmail, until petitioner, forcing the issue, brought about the confession and resignation of that unfortunate. Also Cassidy had only shortly before been harshly criticised in the press for the unflattering role he played in the "Alaskan FHA Scandals" (Ex. 7-1E). Cassidy did not consult Hollyday about petitioner's request for an investigation. Instead, he contrived to have his subordinate and intimate friend, J. A. Woods, Supervising Underwriter, assigned as investigator. He managed this by falsely representing to Curt C. Mack, Assistant Commissioner for Underwriting, that petitioner's complaints made to him, Cassidy, the previous June in Honolulu related to underwriting matters only. He was careful to make no mention of the McCurry matter. (See letter Cassidy to Wright 11/27/53 and Mack's letter to Woods 11/17/53). Mack then ordered Woods to make an investigation of "underwriting matters only", in Honolulu. Cassidy and Woods were intimate friends who frequently traveled together. Both of them had supervisory responsibility over all Federal Housing Administration matters in Hawaii for many years and therefore had a deep personal interest in any investigation in that area. Cas-

sidy "reviewed" the question with Woods via phone before Woods left San Francisco for Honolulu (Ex. #15).

Woods arrived in Honolulu December 8, 1953. He spent much time attempting to persuade petitioner to forget his complaints and did not give up hope of succeeding until his thirteenth day there. Failing to persuade petitioner, he made a pretended investigation and left Honolulu the next day, December 22, 1953. Before leaving Honolulu, Woods and Wright phoned to Washington and recommended that petitioner be placed on enforced annual leave. Petitioner was immediately put on leave by order of Cassidy and W. Richard Lomax, Deputy Personnel Director.

Believing that Woods had merely attempted a "whitewash" of the whole matter and then made only a show of investigating, petitioner wrote a confidential letter to Albert Cole, Administrator of Housing and Home Finance Agency. In this letter which was written after Woods' departure from Honolulu (Dec. 29, 1953, Exh. #6), petitioner set forth formal charges against Director J. Stowell Wright and Chief Underwriter George V. Whisenand. Petitioner then sent a follow-up letter of explanation (Jan. 4, 1954, Ex. #7) to Administrator Cole and asked for an impartial investigation of the Honolulu office and also requested that he be summoned to Washington to confront Woods, Cassidy and others involved. Cole received these two letters upon his return from Christmas holidays, January 14, 1954. He turned the letters over to Hollyday for appropriate action. The requests contained in the letter were ignored. Meanwhile, Woods had written his report on his pretended investigation of the Honolulu office and submitted it January 4, 1954. Particular attention is invited to dates of the two letters sent by petitioner to Cole and the date of Woods' report of investigation, keeping in mind that Woods left Honolulu after completing his investigation,

so called, December 22, 1953, more than three weeks before Cole received the letter containing the charges against Wright and Whisenand.

Using the Woods' report of investigation as a basis for action, George A. Baumann, Personnel Director of Federal Housing Administration, sent a letter of intention to separate for cause to the petitioner. Petitioner was charged with making oral charges against Wright and Whisenand when interviewed by Woods in Honolulu in December, 1953, the charges being contrary to fact. Petitioner was dismissed. He then appealed the dismissal to Civil Service Commission. Mrs. Ethel Mears, Acting Regional Director of Civil Service Commission, ruled in favor of the petitioner on procedural grounds, and petitioner was reinstated to his position.

Immediately upon reinstatement to duty, petitioner was served with a new letter of intention to separate for cause. Again the Woods' report of investigation was used as a basis for the dismissal action. The agency, Federal Housing Administration, this time claimed that the Woods' report of investigation indicated not only that the charges made to Woods by petitioner, orally, but also the charges contained in the letter written by petitioner after Woods' departure from Honolulu were contrary to fact. Petitioner was again dismissed and again appealed.

Petitioner received no notice from Civil Service Commission as to whether his appeal had been upheld or denied. He was simply notified that a Civil Service investigator had been assigned to the case. When the investigator, William Gaspar, contacted petitioner the latter denied the charges made by the agency against him and demanded access to the evidence submitted by the agency in support of their charges. He was informed by Gaspar that the Civil Service Commission's position was, "You (petitioner) made charges against your superiors and now you must prove them. And you may

not see the evidence submitted by the agency until you submit all of your proof of the charges you have made". Petitioner contended that this was an unfair and illegal procedure, but Gaspar was adamant. After more than a week of argument Gaspar warned petitioner that the Civil Service Commission might throw out the appeal for "failure of petitioner to cooperate". Petitioner then reluctantly agreed to submit proof. Then it was discovered that Gaspar, a young man of limited education and having no specialized knowledge necessary to inquire into Federal Housing Administration matters, was hopelessly confused. Nevertheless, even though greatly handicapped by the Civil Service Commission rules which denied petitioner the right to subpoena records or witnesses, petitioner prepared a 58 page affidavit which was submitted November 23, 1954 (Ex. 46) in support of the allegations he had made. Not until then was petitioner allowed to see the Woods' report of investigation upon which the action against him was based. Even then he was barred from making photo copies of it and was allowed to look at it only when in the presence of a Civil Service Commission representative.

Even before petitioner had completed his affidavit of November 23, 1954 and had been permitted to see the report of investigation, Gaspar and the Manager of the Honolulu branch office of the Civil Service Commission, Mr. Atkinson, began pressing petitioner to waive his right to a hearing which he had requested. Petitioner refused. However, after a week of discussion petitioner agreed to sign the waiver, but only on condition that he be permitted to submit an additional affidavit, in lieu of a hearing, in which he would offer statements and arguments, in writing, which he would otherwise have made, orally, at a hearing.

Such affidavit, of 24 pages, (Ex. "A") was notarized and accepted by the Civil Service Commission November

30, 1954. Then the entire statement, the very backbone of petitioner's appeal—because written after he had access to the evidence against him,—was entirely excluded from consideration by the Regional Director of Civil Service Commission in San Francisco. As a result, petitioner was deprived of his right to a hearing, "by trick".

The dismissal of the petitioner by the agency was upheld by Regional Director, William A. Foley. Petitioner then requested a hearing before the Civil Service Commission Board of Appeals and Review. The Board turned down the request, telling petitioner that he had lost his right to a hearing when he signed the waiver in Honolulu. (Ex. #50). The Board of Appeals and Review of the United States Civil Service Commission affirmed the decision of the Director Foley and the petitioner fully exhausted any administrative right of appeal prior to the bringing of this action.

COMMENT ON INVESTIGATOR WOODS' REPORT

The petitioner contends that the investigator Woods, who held the position of Supervisory Underwriter, was not a competent person to make the investigation in question for the reason that any discrepancies or maladministrative matters that he might find in the Honolulu office would reflect upon him personally as a Supervisory Underwriter. An unbiased investigator should have been sent to make the investigation in question. Not only was Woods not a proper person to make the investigation, but his conduct after his arrival in Honolulu is material as to the report he made. He was sent there to investigate the Director Wright and the Chief Underwriter Whisenand, yet he accepted entertainment and hospitality from Whisenand while he was in Honolulu. [Ex. A-Ex. 73] These matters were fully brought before the Federal Housing Administration prior to the petitioner's dismissal and were clearly in the record before the Civil Service Commission.

Woods arrived in Honolulu to make an investigation on December 8, 1953. He remained in Honolulu 14 days, departing on December 22, 1953. He devoted the first three days of his stay almost exclusively to the processing of a large housing project intended for Guam. On the fourth day petitioner had a long talk with him and at that time made known his complaints against Director J. Stowell Wright and Chief Underwriter, George V. Whisenand. The complaints concerned both underwriting and other matters. Petitioner naturally expected Woods to immediately inform Wright and Whisenand of the complaints made by petitioner against them and in case of their denials to return to petitioner for proof and names of witnesses who had pertinent information. Woods made no report back to petitioner and therefore the latter did not know if Wright and Whisenand had made denials or not. There were nine witnesses in the Federal Housing Administration office who had pertinent information and later testified under oath. Woods did not bother to contact any of them. He spent several days visiting and conversing with thirteen different business persons in Honolulu, bankers, real estate brokers, etc. About 30 percent of Woods' report of investigation is made up of detailed accounts of the visits and conversations with these thirteen people. (Ex. #8-attachments) However, these verbose accounts serve only to pad out his report because there is not a single word, not one, in them to show that he was investigating any of the petitioner's complaints which were before him.

During his conversation with Woods, petitioner pointed out a number of cases in the files and suggested that he look into them for certain designated irregularities, letters and points which had bearing on the complaints he was supposed to investigate. Instead of looking for the things petitioner had indicated to be in the files, Woods simply copied most of the processing data, verbatim, and incorporated the material in his report. He was just

making a show of investigating and padding his report. Petitioner was present in the office at all times and available to pinpoint the items for him. He did not ask for such cooperation. We point to only two instances which are illustrative of the manner in which Woods pretended to make an investigation: 1) On page 13h of his report Woods copies and reviews the processing of Case #70-009041 which was meaningless and uncalled for. In this case Whisenand had made an appraisal of the property without measuring the house. In fact, there was a question as to whether Whisenand had even left the office to look at the property. When the owner of the property complained to the bank, Director Wright wrote a letter in which he made false representations and concealed the true facts in order to "cover up" for Whisenand. Petitioner asked Woods to read the copy of that letter, nothing else. 2) On page 15k of his report Woods made a detailed review of Case #70-011246 only to make a show of investigating. Petitioner had directed Woods' attention to this case as illustrative of the manner in which McCurry, former chief underwriter, had been stealing and altering official documents. This was one of the cases from which McCurry confessed he stole the original papers. There was no need for Woods to review the processing and copy all of the data. 3) On page 2 par. 5 of his report Woods presents the matter of Whisenand's association with subversives as though it was an allegation made by petitioner. Woods took this out of mere informal unofficial conversation with petitioner, and tried to give it a look of importance in his report. No mention of the matter is made in the letter of charges against the petitioner in this action.

Woods' dishonesty and lack of objectivity in his investigation and his report are shown by: 1) On page 8, par. 4 of his report Woods said that petitioner told him that he did not remember the specific case or cases from which

the original reports of valuator had been removed. Woods' own report shows that this statement is false. On page 15k where Woods wrote up the data pertaining to Case #70-011246 Woods states: "Mr. Houston stated that in this case the report of valuator was discarded twice and that land value was increased." Petitioner told Woods that McCurry confessed to Cassidy that he had stolen the original papers from this case; 2) On page 17, par. 7 of his report Woods says: "They (Mr. Whisenand and Mr. Fielder) further stated that underwriting manuals had been delivered to Mr. Wright prior to the beginning of the examination. . . . ." In his sworn statement (Ex. No. 7L) Mr. Fielder flatly contradicts Woods. Mr. Fielder testified that the underwriting manuals had not been collected by Mr. John Wright prior to the beginning of the examination; 3) On pages 10 and 11 of his report Woods shows that he accepted the explanation offered by Whisenand for his deletion of more than $40,000 worth of pledged appliances from the mortgage records. If Woods had been fair and desirous of obtaining the real truth, he would have demanded something in writing in support of the explanation, such as, a letter of request from the mortgagee. Also, he would have sought a statement from the mortgagee. But he chose to accept the word of Whisenand, a proven liar and cheat.

As petitioner related in his letter of January 4, 1954 to Administrator Albert Cole (Ex. No. 7), while making his investigation in Honolulu Mr. Woods tried to persuade petitioner to forget his complaints against Wright and Whisenand, and offered to send petitioner a "top man" to assist him in his undermanned appraisal section if petitioner would forget the complaints and work in harmony with Wright and Whisenand. That Woods did not despair of persuading petitioner until December 21st, his thirteenth day in Honolulu, and that he was more concerned with "resolving" the matter than investigating petitioner's complaints against Wright and Whisenand is evidenced

by his report covering December 21st and 22nd, 1953. On page 17, par. 8 of his report Woods states: "I was of the opinion that the situation could be satisfactorily resolved until a discussion which I had with Mr. Houston on the afternoon of December 21st." On page 18 of the report Woods tells what took place on December 22nd. In the second paragraph (unnumbered) of page 18 Woods says: "At this point I was convinced that further discussion would be futile and terminated the conference." Then in the fourth (unnumbered) paragraph of the same page he says: "Subsequent to this discussion with Mr. Houston, a conference was held in Director Wright's office. I transmitted to Messrs. Wright and Whisenand the allegations made by Mr. Houston. . . . ."

So, as indicated by his report, Woods did not inform Wright and Whisenand of petitioner's charges against them until his fourteenth and last day in Honolulu. On the same evening Woods left Honolulu and returned to the mainland.

It is a strange investigator, indeed, who receives complaints against government officials and does not even tell them that there have been allegations made until a few hours before his departure from the city, and then hurries away without taking statements—not even denials—from those who have been accused or from numerous available witnesses. Woods' own report shows that he made his investigation, so called, in just that manner.

Sprinkled thru his report are statement, belittling to petitioner, attributed to McCurry, former chief underwriter, who had been forced to resign. McCurry was readily available. Why did not Woods get a statement from him? It is noted in his report that Woods lays foundations for conclusions by reciting supposed conversations of former years with Wright, Whisenand and McCurry—all of whom naturally were biased—and expressions of his own, such as: "In my opinion"; "it appears that"; "I believe"; "I am convinced", etc., but solid evi-

dence is totally lacking. "An opinion not supported by facts does not reach the dignity of evidence". (NLRB v. Amer. Pearl Button Co. (C.C.A. 8th, 1945) 149 F.2d 311).

The Court is urged to examine petitioner's Exhibit "A": which refutes the Woods' report point by point and shows it up for what it is, a clever deception. This exhibit is an affidavit which, after persistent urging by the Honolulu Civil Service Commission representatives, was submitted by petitioner in lieu of a personal hearing before the Civil Service Commission.

The affidavit of November 30, 1954—24 pages—could well be considered the backbone of petitioner's case because it was prepared after petitioner had seen some of the evidence against him. Petitioner had not seen the evidence until this late date (11-23-54). However, this important part of petitioner's evidence was entirely excluded from consideration by the Regional Director of the Civil Service Commission. The affidavit was not even in the defendant's file. Thus, the petitioner was in effect deprived of his right to a hearing, by trick.

Beginning on page 19 of his report Woods presents his "conclusions", numbered 1 to 8. The conclusions are meaningless and of no force or effect for the following reasons: 1) They are entirely naked of evidence and Woods gives no reasons or explanation. "There is a salutary discipline in formulating reasons for a result, a discipline wholly absent where there is a freedom to announce a naked conclusion. . . . . The exposure of reasoning to public scrutiny and criticism is healthy." (Final Report of Attorney General's Committee on Administrative Procedure pp. 29-30); 2) If Woods was legally authorized to make the investigation, at all, he was limited by his orders (Letter Mack to Woods 11/17/53—page 7) to inquire into underwriting matters only. Therefore he exceeded his authority when he attempted to inquire into matters referred to in conclusions Nos. 1, 2, 5, 6, 7 and 8 which pertain to matters which

are not underwriting; 3) Although the matters mentioned in conclusions Nos. 3 and 4 do come under underwriting there is nothing in these conclusions that even remotely suggest that petitioner made serious compliants against his superious which were contrary to facts.

The discharge of petitioner from his position, based upon unsupported conclusions as made by Woods, is a good example of "Decision by fiat". In this connection Chief Justice Hughes said: "to make findings of these agencies conclusive regardless of the nature of the evidence is to place those rights at the mercy of administrative officials and to impair the security inherent in our judicial safeguards". (St. Joseph Stock Yards v. U. S., 298 U.S. 38, 52 (1936)).

Again quoting the same eminent jurist: ". . . , if these multiplying agencies deemed to be necessary in our complex society are to serve the purpose for which they were created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play". (304 U.S. 1, 22 (1938)).

Special attention is invited to the fact that notably missing from the Woods' report is an account of the entertainment furnished to him, on two occasions, by Whisenand at the latter's home when Woods was in Honolulu to investigate complaints against his host. This was highly improper conduct, which Woods has not denied (see Exh. 73, pg. 6), and should have caused the rejection of his report. Instead, the report was made the basis for the removal action against the petitioner.

Absent also from his report is an account of Woods' visit to the office of Mr. Sandy Parker in Wahiawa. A report on this visit is shown in Ex. "A" 18-20.

Also report on his private interview with Mr. Weiss and Mr. Larsen (Ex. 46, pg. 48) are conspicuously absent.

QUESTIONS INVOLVED

1. Whether a civil service employee of the United States, having attained a permanent status with veterans preference, may be discharged from his position and grade by charges filed against him which are in no way sustained by the evidence presented against him?

2. Where charges have been filed against a permanent civil service employee and he is dismissed and consideration is given to incompetent and irrelevant evidence, may his discharge by sustained by the U. S. Civil Service Commission and the U. S. Court of Claims?

3. Where a permanent civil service employee with veterans preference has had charges filed against him, and the officials of his administration and the U. S. Civil Service Commission acted in an arbitrary and capricious manner by disregarding the evidence of record and considering matters which are not competent evidence, may his action in the U. S. Court of Claims be dismissed?

4. That the petitioner did not receive a fair or honest hearing before the Federal Housing Administration or the U. S. Civil Service Commission for the reason that the evidence before both the Federal Housing Administration and the Civil Service Commission conclusively shows that the charges that the petitioner made against certain officials of the Federal Housing Administration were fully sustained by the evidence he produced and that there was no evidence to the contrary.

5. That there were numerous and divers errors in the matter of the adjudication of the charges filed against the petitioner both by the Federal Housing Administration and the U. S. Civil Service Commission in adjudicating his appeal, and the U.S. Court of Claims in rendering its judgment against the petitioner erroneously interpreted the evidence and made findings which are contrary to the

facts in the case. These matters will be referred to more specifically in the reasons for granting the writ in this case.

6. That the U. S. Court of Claims erred in sustaining the government's motion for a summary judgment upon the ground that there was a genuine issue of fact to be determined, and the petitioner was precluded from taking testimony to sustain the allegations of his petition.

PERTINENT STATUTE

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: Provided, That such preference eligible shall have the right to make a personal

appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative office and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: Provided further, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title. June 27, 1944, c. 287, p. 14, 58 Stat. 390, amended Aug. 4, 1947, c. 447, 61 Stat. 723.

SPECIFICATIONS OF ERRORS TO BE URGED

The petitioner will urge that the decision of the United States Court of Claims in the action which he brought there is clearly contrary to the facts showing that the action of the officials in question was arbitrary and capricious in that the decision was clearly contrary to the evidence before them and that the petitioner did not receive a fair and proper hearing before the Civil Service Commission as required by Title 5 U.S.C. 863, and the lawful regulations of the Civil Service Commission issued pursuant to law.

REASON FOR GRANTING THE WRIT

The petitioner asserts that a writ of certiorari should be granted under Subdivision (b) Part V of Rule 19 of this Court in that the Court below has decided a question of law and fact conflicting with the decisions of this Court and has failed to hold that the actions of the officials of the Federal Housing Administration and the

U. S. Civil Service Commission were arbitrary and capricious and clearly contrary to the evidence of record in discharging the petitioner from his governmental position.

The petitioner, a long time civil service employee of the United States, reported to his superiors the conduct of other employees in good faith and with an honest intent that the complaints which he filed would be properly investigated. At the very outset the petitioner contends that no charges should have ever been filed against him. He had the assurance from high public officials in Washington that it was his duty, as well as the duty of other employees, to report maladministration of the affairs of his agen v, but as it happens in his case as in many others, the employees so reporting matters of this character are themselves dismissed from the service.

The petitioner contends that what he did in making the report in question was no more than what an honest competent and capable official should have done, and for which, he has now been penalized.

The decision of the U. S. Court of Claims below clearly conflicts with the decisions of this Court. At the very threshold attention of the Court is particularly directed to those charges which were filed against the petitioner on the statements which he made to the investigator Woods which are shown on page 41 of this petition. At the time in question the investigator Woods was only authorized to inquire into matters relating to underwriting in the Honolulu office. None of those charges relate to underwriting and therefore Woods exceeded his authority by inquiring into them. (See letter Mack to Woods 11 17 53) Conversations that petitioner had with him were in connection with this investigation and they were highly privileged. Counsel for the petitioner had been unable to find any Federal case directly in point, but the case of *Berg* v. *Harold W. Marsh*, 294 NY 713, 61 NE 2d 450 affirming the Appellate Div. 48 NYS 2d

285. In the Berg case plaintiff was a civil service employee of the City of New York. Plaintiff was suspended for a period of five (5) days on an alleged dereliction of duty. Plaintiff wrote a letter to the President of the State Civil Service Commission in which he criticized the department for his treatment. The Appellate Div. of New York and the Court of Appeals held that the letter was testimony before an investigating committee and that he could not be discharged on the grounds that the testimony constituted false criticism of the members of the municipal Civil Service Commission.

This decision was based upon the fact that whatever information he had given to the President of the Civil Service Commission was privileged because it was made during the course of an investigation.

In adjudicating the charges filed against the petitioner, the Federal Housing Administration officials, and the Civil Service Commission, based their decisions in part on the charges which were filed against the petitioner for the statements that he had made to the investigator Woods. The Court of Claims in its decision held that the statements were not privileged by dismissing the suit which the petitioner filed.

The petitioner points out the consideration of incompetent evidence.

In sustaining the charges filed against the petitioner the officials of the Federal Housing Administration, and the Civil Service Commission, predicated their decisions to dismiss the petitioner primarily on the report of investigator Woods. Woods reported in Honolulu on December 8, 1953, and left on December 22, 1953 (Ex. 8 Report of Woods). It must be remembered that Woods was sent to Honolulu only to investigate underwriting matters in the office there.

Woods' Report Relied Upon Both by the Civil Service Commission and the Court of Claims Was Completed and Filed Prior to the Receipt of the Petitioner's Complaints Contained in the Letter of December 29, 1953 Which Was the Basis of the Charges Other Than Those Contained in the Statement to Investigator Woods.

The Court will note that the charges filed against the petitioner, except the statements to Woods while in Honolulu, are contained in a letter dated December 29, 1953. This was seven days after Woods had left Honolulu. He could not have investigated the complaint the petitioner made in this letter, and yet, the decision of the Civil Service Commission and indeed the Court below is predicated upon Woods' report which in no way made reference to the complaint the petitioner made in the letter of December 29, 1953.

See page 3 of the Court's opinion (A. 49). The Court said that Woods made a thorough investigation of the complaints. Yet as being investigated the Court mentions the complaints which were contained in the letter of December 29, 1953 which Woods in no way investigated.

Foley when he made his findings for the Regional Office of the Civil Service Commission also fell into error, (Page 27, Ex. 48) when he said, "The agency, on the other hand, bases its case primarily on the investigation by Mr. Woods." And again on the same page, "The report submitted by Mr. Woods, which as stated, is the basis of the agency's case. . . ." It is thus brought to the attention of this Court that in adjudicating the charges filed against the petitioner the Civil Service Commission, and the Court below, relied on the report of investigator Woods which in no way establishes proof of any of the charges against the petitioner relative to the complaints he made in the letter of December 29, 1953.

The Actions of the Federal Housing Administration and the Civil Service Commission Were Clearly Arbitrary and Capricious.

In addition to the other matters discussed in this petition for certiorari, the petitioner calls the attention of the Court to the following actions which it is asserted show that the actions of the Federal Housing Administration and the Civil Service Commission were arbitrary and capricious.

Federal Housing Administration

In a letter to Albert Cole, Administrator of Housing and Home Finance Agency, dated January 4, 1954 (Ex. #7), a follow-up of his letter of December 29, 1953, petitioner requested that a person or persons familiar with Federal Housing Administration matters be sent to make an investigation of the Honolulu Federal Housing Administration office. The petitioner also requested that he be summoned to Washington so that he could confront J. A. Woods, Cassidy and others. Petitioner's requests were ignored and he was discharged. This was arbitrary action on the part of the Federal Housing Administration for the following reasons:

1) The Federal Housing Administration was the only agency with the specialized knowledge and capability to make a proper investigation.

2) The agency, Federal Housing Administration, was aware that Woods had not and could not have investigated the charges made in petitioner's letter to Mr. Cole (Ex. #6) because Woods had no knowledge of the charges when he was in Honolulu and made no mention of the charges in his report. Yet, the agency proceeded with its adverse action against the petitioner knowing that the Woods' report of investigation did not "indicate that the charges made by petitioner were contrary to facts" as the agency claimed. (Ex. #31)

(3) The agency was aware that Woods was not a proper person to make the investigation because of his deep personal interest, and had already been informed of Woods' misconduct in connection with the entertainment and hospitality furnished to him by one of the officials charged with the wrongdoing he, Woods, was supposedly investigating.

Finally, despite the reasons mentioned above, the agency imposed a punishment on the petitioner by means of an adverse action which, although administrative in form, was criminal in nature. The charge upon which petitioner was dismissed from his position contained all of the elements of "criminal libel". Thus, under the Civil Service Commission's rules and regulations the agency was enabled to punish the petitioner while denying him his constitutional rights to confront accusers and subpoena witnesses and records. It is contended that this arbitrary action vitiates the action against petitioner.

"The right to pursuit of happiness . . . or means of living, or any material right essential to enjoyment of life at the mere will of another . . . is the essence of slavery". (Mr. Justice Matthews in Yick Wo v. Hopkins ('86) 118 U.S. 356, 369, 370, 30 L. Ed. 220, 6 S. Ct. 1064); (White v. Chin Fong (1920) 253 U.S. 90, 64 L. Ed. 797, 40 S. Ct. 449); (U.S. ex rel Coria v. Commr. of Immigration (D.C. S.D. N.Y. 1938) 25 F. Supp. 569).

Civil Service Commission

Foley's attitude of hostility toward petitioner became immediately apparent and he seemed to take small pains to conceal it. This hostility was evidenced at the start by his failure to consider petitioner's evidence indicating that the procedural defects in the case were even more pronounced than in the previous case which Mrs. Mears decided in petitioner's favor. In total disregard of petitioner's contention and evidence, he made no ruling on

the question of procedural defects and merely notified petitioner that his appeal had been assigned for investigation.

When the Civil Service Commission investigator, William Gaspar, entered the case, it was reasonable to assume that he was acting under Foley's orders when he kept the evidence submitted by the agency hidden from petitioner and insisted upon placing the burden of proof on the petitioner. This assumption was confirmed by the findings made later by Foley. This action by the Civil Service Commission was arbitrary. At no time has the Civil Service Commission inquired into the sufficiency of the evidence submitted by the agency, which, was the first duty.

After receiving the papers pertaining to the case from Honolulu, it appears that the very first thing Foley did was exclude the affidavit (Ex. "A") which petitioner had been permitted by the Civil Service Commission to submit in lieu of a hearing. That affidavit was most certainly the most important part of petitioner's testimony because it was prepared immediately after he had been permitted to see the evidence offered by the agency against him which had been kept hidden from him for more than 60 days while Gaspar was investigating. This was the only opportunity petitioner had to refute the evidence submitted by the agency. Among other points, the affidavit made a point by point refutation of the Woods report. In addition, it challenged Woods' fitness to make the investigation. Woods never did deny the misconduct charged against him. Neither the agency nor the Civil Service Commission has taken a statement from Woods concerning it. Foley's findings (Ex. #48) do not show a single reference to anything contained in petitioner's lengthy affidavit of 24 pages.

"A refusal by an administrative agency, such as NLRB, to receive and consider competent and material evidence

offered by a party to a proceeding before it, amounts to a denial of due process of law, and the fact that the agency would or might have reached no different conclusion had rejected evidence been received, is entirely beside the point" (NLRB v. Burns, C.A. Kansas 1953, 207 F. 2d 434).

To exclude such evidence was arbitrariness of the rankest order on the part of Foley.

A review of Director Foley's findings (Ex. #48) reveals many examples of arbitrariness, some of which are here indicated:

1) On page 1 of the findings Foley says: . . . . "appellant complained to Mr. M. Joseph Cassidy of the manner in which underwriting activities were being accomplished in the Honolulu office". Here Foley ignores the sworn testimony of petitioner (Ex. "A: p. 16, 21 & 22) which showed that petitioner's complaints concerned more than underwriting activities. It was Cassidy's wish and aim to make it appear that only underwriting matters should be investigated and no inquiry be made into his, Cassidy's, connection with the McCurry sex-deviate matter. Foley should have accepted petitioner's statements in this connection which were made under oath;

2) On page 2 Foley says: "It is an established principle . . . that we cannot consider evidence against the appellant which is not contained in the charges, . . . and evidence presented by the agency or the appellant which is not directly related to the specific charges, . . . may not be considered by us". Then, contrary to this declaration, on page 25 he says: "Of great significance in Mr. Woods' report of investigation are statements of a number of influential citizens . . .". But the statements (Ex. #8 attachment) of those citizens had no relation whatever to any specific complaint then before Woods;

3) On page 4 Foley makes his first reference to a "written report to Mr. M. Joseph Cassidy". This report (Ex. #76) was an unsworn memorandum. This memorandum, being unsworn and not directed to proper authority, was admitted in evidence by Foley in violation of Civil Service Commission rules and regulation (22.8 (b)). It was used by Foley throughout his findings in defense of Wright.

4) On page 10, speaking of the letter which J. Stowell Wright claimed to have written to Cassidy April 4, 1951, Foley said: "From the record before us we don't know what Wright submitted in his report of April 4, 1951 . . .". Yet, he accepted Wright's unsworn statement supposedly contained in a letter to his partner in wrongdoing, Cassidy, not knowing whether such letter ever existed. At the same time Foley shut his mind to petitioner's sworn statement (Ex. #46 p. 17) to the effect that Wright told petitioner that he had reported to Washington that he, Wright, had been unable to uncover any factual evidence. And Wright had not denied making that statement to petitioner;

5) On page 18 Foley says: "Under the circumstances it is quite possible that the backdating of the memoranda was done for the purpose of fixing the responsibility in Mr. Whisenand". Neither Whisenand nor the agency offered or suggested such a defense. Why should Foley put it in, gratis?

6) On page 21 Foley says: ". . . , we believe it quite probable that the misrouting of the case to the Architectural Unit first, ... was an error chargeable to the former chief underwriter, Mr. McCurry". On this point Whisenand made no denial or defense. Why should Foley volunteer a "quite probable" defense for him?

7) On page 23, Whisenand was charged with knowingly taking an examination which was not properly

supervised. Foley held that while the examination was not properly supervised when Whisenand took it, he, Whisenand, was not guilty as charged because the supervision of the examination was not his responsibility. Whisenand had not been charged with improperly supervising an examination. He was charged with knowingly taking an improperly supervised examination. Such strained and twisted logic is clearly arbitrary.

8) On page 26 Foley says: ". . . the appellant has not furnished convincing evidence to support his charge that Mr. Whisenand was a "liar": This was a wholly ridiculous conclusion because Whisenand was held by Foley to be a "cheat" for submitting fraudulent expense vouchers. Each time Whisenand submitted a fraudulent expense voucher he certified that it was "true and correct", therefore he lied (in writing) each time. Also John Wright and Whisenand told the same story concerning the promotional examinations. Foley was compelled by overwhelming contrary evidence to hold that John Wright's story (Ex. #48 p. 23) was false. Yet, even though Whisenand told the same false story (see Ex. #77) as did John Wright, Foley ruled that Whisenand is not a liar. Also commenting on statements of witnesses who testified that Whisenand had told lies to them, Foley said on page 16: ". . . it cannot be determined that Mr. Whisenand *intentionally* told a falsehood".

9) On page 25 Foley says: "Mr. Houston has supplied names of persons who he stated could and would substantiate his allegations. The witnesses have in a number of instances verified his statements, but in respect to many of his serious allegations, there is a decided lack of evidence (except for Mr. Houston's own statement) to support his position". A review of the affidavits of the witnesses referred to reveals that when Foley said "The witnesses have in a number of instances verified

. . .", it was a gross understatement. Here Foley conveniently passes over the fact that Wright and Whisenand had not denied the allegations and the agency had produced no contrary evidence in opposition to sworn statements of petitioner and his nine witnesses. In this connection petitioner said in a letter to the Civil Service Commission, (Ex. #51 pg. 11):

> "The Director has taken an unsympathetic view of my sworn statements when not fully corroborated, although unchallenged by the agency. However, he has not hesitated to take to his bosom the unsworn statements presented by the agency, particularly those written by Mr. Wright and Mr. Whisenand after they had learned of my intention to prefer charges against them. But the unkindest cut of all lies in the Director's reliance upon carefully selected parts of the report of investigation, despite the fact that Mr. Woods' fitness to conduct such an investigation has been challenged, and in complete disregard of solid reasons advanced to justify the rejection of the report of investigation in its entirety".

10) On page 3 Foley says: ". . ., we believe that in order to show good faith, the appellant should be possessed of all the evidence necessary to prove his case at the time he made his allegations . . ."

If Foley's belief was truly stated here, he exhibited a conspicuous inconsistency in his treatment of charges made by petitioner as opposed to charges made by the agency. In accordance with his belief, as expressed above, he should have required the agency to show that it was "possessed of all the evidence necessary to prove its case at the time it made its allegations" against the petitioner. This, he did not and has not done. He made no inquiry into the sufficiency of the agency's evidence then or ever. Instead, he turned the whole case around by unlawfully placing the burden on the petitioner. He, in effect, demanded that petitioner prove himself innocent of the charges made by the agency against him. At the same

time, the Civil Service Commission kept [redacted] evidence against him under cover, and under the Civil Service Commission rules denied him the right to confront his accusers and to subpoena necessary records and witnesses.

The regulations of the Civil Service Commission require that where appeals are taken by a veteran preference eligible such as this petitioner, that the Commission shall develop all facts and circumstances in connection with the appeal. The regulations also require that the statements taken from witnesses shall be by affidavit. Investigators are employed specifically to obtain these statements. Yet in the appeal that the petitioner made, no contact whatever was made by the investigators to consult Director Wright and Whisenand the two officials in question, and no affidavits were ever received from them. Furthermore, no statement under oath was obtained from investigator Woods as to the improper conduct charge made against him. The Civil Service Commission should have also contacted Mr. Cassidy particularly as to whether a report had been made to him by Director Wright relating to McCurry's conduct.

It will at once be seen that no proper investigation was ever made by the investigators of the Civil Service Commission in accordance with their regulations. This, of itself, shows that the petitioner did not receive a proper or a fair hearing before the Regional Director Foley. Furthermore, Foley considered interoffice memorandums written by Director Wright and Whisenand as proper evidence. These memorandums referred to alleged facts not appearing of record nor in any other way substantiated, and Director Foley drew an inference on inference on the matters contained in the said memorandums which were of no evidentiary value whatsoever.

This Court, in the case of Interstate Commerce Commission v. Louisville & Nashville Railway Co., 227 U.S.

88, 91, 93, and in the Chicago Junction cases, 264 U.S. 258, held "that nothing may be treated as evidence which is not introduced as such".

The above cases are cited because the unsworn memorandums made referred to a letter allegedly written by Director Wright which was not placed in evidence, yet Director Foley held that the statement in the memorandum was conclusive evidence that the letter in fact had been written.

Regional Director Foley in deciding this issue totally ignored the sworn affidavit (Pltf's. Ex. "A") presented by the petitioner.

The petitioner further shows to the Court that Regional Director Foley made an independent inquiry (Ex. #48 p. 5) at another Federal Housing office and asserted he obtained information prejudicial to the petitioner. Foley did not communicate to the petitioner places where he visited or the witnesses he consulted, and this was a deliberate and unprecedented action on the part of the Regional Director Foley who was sitting as an examiner in the case taking the testimony in the case. It was his plain duty to obtain sworn statements from the persons he contacted and disclose that information to the petitioner so that he could properly rebut it. For this fact alone, this Court should conclude that the petitioner did not receive a fair or proper hearing before the Regional Director.

The petitioner waived his right to a hearing upon an agreement that he could file an affidavit which would be considered by the Civil Service Commission in lieu of a hearing. He filed his affidavit (Ex. "A"). This affidavit was given no consideration whatever by Director Foley or the Board of Appeals and Review when they considered his case, which is a violation of Regulation 22.9(a) of the Civil Service Commission.

The regulation of the Civil Service Commission provides as follows:

> "The decision on the appeal shall be made in a finding consisting of an analysis of the evidence, reasons for conclusions reached and the recommendation for action." (22.10(a))

This regulation was violated in the following manner:

1) The failure of the Regional Director to even consider, let alone analyze, petitioner's affidavit of November 30, 1954 (Ex. "A").

2) Regional Director ignored affidavits of petitioner and Woods' own secretary, Mrs. Lahart, (Ex. #73) indicating that the investigator Woods was not a proper person to conduct an investigation because of his personal interest and improper conduct which should have caused the rejection of his report of investigation.

3) Director ignored the petitioner's evidence showing that procedural defects in the agency's letter of charges. Under the regulations of his Commission, he should have analyzed this evidence and made a decision and given his reasons therefore.

The Decision of the Court of Claims Conflicts With the Decisions of This Court.

The Federal Housing Administration in discharging the petitioner based upon the alleged charges against him made no findings or conclusions of any evidence before them.

This Court held in the case of Dobson v. Commissioner of Internal Revenue, 320 U.S. 489, 88 L. Ed. 248, that agencies are required to make findings of fact on material issues of fact.

The Civil Service Commission in rendering its alleged decision made no reference to the undisputed evidence

offered by the petitioner and in truth and fact did not consider such evidence, and the Court of Claims fell into the same error.

This Court held in the case of Lloyd Sabauda Soceita Anonium v. Biting, 287 U.S. 329, 77 L. Ed. 341, that appropriate evidence offered in an administrative hearing must be considered by the agency. In petitioner's case, this rule was definitely violated by the agency, and the Court below should have so found.

See also the case of Bangamon Val. Television Corp. v. U. S., where the Court of Appeals for the District of Columbia, 269 F.2d 221, 106 U.S. App. D.C. 30, followed the rule in the case just above.

The error of the agency may be so great that the decision of the agency must be set aside.

Tisi v. Todd, 264 U.S. 131, 68 L.Ed. 590.

The petitioner's case is very similar to the decision of the Secretary of Labor in the immigration case of Kwock Jan Fat v. White Commissioner, 253 U.S. 454, 64 L. Ed. 1010. The Court will recall that neither Director Wright or Whisenand filed any affidavits with the Civil Service Commission or were they contacted as they were required to be under the regulation of the Civil Service Commission. Instead, two unsworn memorandums, each to the other, were considered as evidence by the Civil Service Commission despite the sworn statements and affidavits of many witnesses on behalf of the petitioner.

This Court held that findings by a National Labor Relations Board must be set aside where the evidence before the Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the evidence.

Universal Camera Corp. v. NLRB, 340 U.S. 474, 71 S.Ct. 456, 465.

Although the Courts are liberal in relaxing the ordinary rules of evidence in administrative hearings, the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which are asserted or defended.

Bridges v. Wixon, 326 U.S. 135, 89 L.Ed. 2103

The decision of the Court of Claims conflicts with the decisions of the Court of Appeals.

Mason ex rel Lee v. Commissioner Immigration, 27 F.2d 580, 1st CCA

CreamWipt Food Products v. Federal Security Adm., 187 F.2d 789, 3 CCA

An administrative agency is bound by the rules of common sense which prevail in legal proceedings.

Sturdivant v. Comm. Internal Revenue, 75 F.2d 316

This Court has held that all quasi-judicial hearings must be fair and honest hearings.

Greene v. McElroy, et al, 360 U.S. 474, 3 L.Ed 2d 1377

The arbitrary action of the Civil Service Commission is very apparent when the facts are known. The two officials which the petitioner reported were separated from their governmental positions. Director Wright resigned with the charges pending against him, the same ones which petitioner reported. Whisenand was discharged for the same reasons to his conduct that petitioner had reported to his superiors.

The Court of Claims Erred in Sustaining the Motion for a Summary Judgment Because of the Genuine Issue of Fact.

The Court below sustained the Respondent's motion for a summary judgment. Under rule 50(d) of the Court

of Claims a motion for summary judgment may only be granted when there is no genuine issue of fact to be determined. The issue in this case was whether the Federal Housing Administration and the Civil Service Commission acted arbitrary and capricious. That question involved an issue of fact. The Court of Claims for this reason erred in granting the motion for a summary judgment.

This rule of law is so well known that citation of authority does not appear to be necessary. The question when a motion for a summary judgment or for a directed verdict may be granted is discussed in the case of Gunning v. Cooley, 281 U.S. 90.

CONCLUSION

WHEREFORE, Petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court directed to the United States Court of Claims, that upon a review that the decision and judgment of that Court be vacated, reversed, and set aside, that this cause be remanded to the said Court of Claims with instructions to proceed in accordance with the views of this Court.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 342-59

FRANCIS D. HOUSTON,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

1. PETITION

(Filed August 13, 1959)

To the Honorable Chief Judge and the Judges of the Court of Claims:

The plaintiff, Francis D. Houston, respectfully represents:

1. That your plaintiff is a citizen of the United States, and now resides in the City of Phoenix, State of Arizona, and brings this suit in his own right.

2. The plaintiff alleges that he enlisted in the military service of the United States on February 25, 1942, and thereafter served continuously until the date of his honorable discharge on July 7, 1946.

3. The plaintiff alleges that on April 9, 1947, he was given a probational appointment as Valuator (506) 53-4 (3) CAF-9 in the Federal Housing Administration in its field office at Honolulu, Hawaii, and that he subsequently satisfactorily completed his probationary period, and

attained the status of a permanent civil service employee of the United States with veterans preference. Effective February 19, 1950, his job position was changed to the title of Appraiser (510) 53-4 (6) GS 1171-9, and on August 17, 1953, a previous promotion of October 12, 1952, was made permanent and plaintiff was given a position and grade of Appraiser (Supervisory) 53-6 (6) GS-1171-11 in the Underwriting Division, Valuation Section at Honolulu, T. H.

4. The plaintiff alleges that, relying upon assurances of high government officials, including the President of the United States, that as a government employee it was his duty to honestly report any matter or conduct of officials contrary to the best interest of his government, the plaintiff on December 29, 1953, in a letter addressed to Administrator Albert M. Cole of the Housing and Home Finance Agency did report on the conduct of the certain officials of the field office at Honolulu, T. H.

That the report which the plaintiff made in the letter of December 29, 1953, relative to the administration of the Field office at Honolulu was honestly made in good faith and represented conditions in said field office as it appeared to the plaintiff and what he believed to be a dereliction of duties of the certain officials mentioned in said letter. The plaintiff alleges that since he acted in good faith and within the scope of his duties the said letter of December 29, 1953, was a highly privileged communication and one upon which no charges could legally be placed against the plaintiff.

5. The plaintiff further alleges that by reason of the letter of December 29, 1953, referred to in paragraph 4, certain charges were filed against him on July 8, 1954, based upon his statements contained in the letter of December 29, 1953, and the report he made to an investigator, J. A. Woods; that the said charges were in the following words and figures:

"Mr. Wright is unfit to hold his office because—

1) His record during the six years that I know of has been characterized by shameful indolence, gross neglect of duty, incredible gullibility and the exercise of authority in an arbitrary, capricious and abusive manner.

2) He withheld pertinent, substantial and admissible evidence in connection with the investigation of a highly placed federal employee who was suspected of being a dangerous security risk.

3) Mis-use of public funds. This latter is not claimed to come within the legal definition of embezzlement, but rather amounts to the expenditure of public monies via 'slick' maneuvers which on paper comply with the letter of the law, but actually redound to the personal benefit of Mr. Wright and others, and certainly violate the spirit of the law. These clever transactions are common knowledge. They tend to reflect discredit upon the service, destroy the morale of rank and file employees and engender bad public relations, especially in these times when 'economy in government' is being so strongly emphasized at top Washington levels.

4) Over my repeated objections and recommendations and those of realtors, mortgagees and others, Mr. Wright has stubbornly refused to permit the processing of cases involving leasehold estates in accordance with the provisions of the Underwriting Manual. This practice has greatly encouraged speculation and served to speed up an already racing inflation, meanwhile working a hardship on owners of fee simple properties by abetting unfair competition.

5) Ignoring the 'alerts' sounded by the Washington Office anent housing in the vicinity of airports and in complete disregard of the Report of the President's Airport Commission, Mr. Wright approved a site for a huge military

housing project (now under construction) in an extremely hazardous location. In fact, it would be difficult to select a more dangerous location if one deliberately set out with a mind to do so.

"As concerns Mr. George Whisenand, Chief Underwriter, I told Mr. Woods that I intended to prove that Mr. Whisenand is unfit to hold his office because he is a liar and a cheat, in addition to being loud, boorish, overbearing, and generally ill-mannered in his dealings with his associates and others.

"Specifically, 1) Mr. Whisenand has authored and conducted a campaign of villification against me, based entirely upon falsehoods, and all stupidly calculated to excuse his deliberate improper handling of official business involving a huge sum of money. 2) On a recent date Mr. Whisenand knowingly took an examination for promotion which was not prpperly supervised as required by law.

These charges which appear in your letter are of the same general nature as those made to Mr. J. A. Woods, Underwriting Supervisor, when he reported to the Honolulu Office for the purpose of completing an investigation which you had requested. In interviews with Mr. Woods, you charged that:

1) Messrs. Wright and Whisenand are incompetent to execute the functions of the positions which they hold. Mr. Wright is honest but gullible, and Mr. Whisenand is undependable.

2) Mr. Wright had knowledge, and evidence was available to him, that Mr. McCurry was a sexual pervert, but Mr. Wright withheld this information and did not report it to his superiors. This was a dereliction of duty.

3) During a promotion examination, Mr. Whisenand and Mr. Fielder were seated in the Underwriting Section of the office, removed from Mr. John H. Wright, Assistant Director, who was charged with the supervision of the

test. Mr. Wright was in another office during the examination, listening to a radio. Mr. Whisenand and Mr. Fiedler conversed during the examination, and texts, letters of instructions, and information were available to them. Although you did not allege that such information was used by these two gentlemen, you indicated that the conduct during the examination, which was in effect not supervised, was unethical and represented a practice which should have been rejected by responsible individuals.

4) You had determined that you would not continue to work with either Director Wright or Chief Underwriter Whisenand for the reason that you consider them to be liars and cheats."

6. Plaintiff further alleges that by reason of the said alleged charges, as set forth in paragraph 5, he was separated from his governmental position on August 27, 1954.

7. Plaintiff further alleges that as a veterans preference eligible he duly appealed his discharge from governmental employment to the U. S. Civil Service Commission in accordance with Section 14 of the Veterans Preference Act of June 27, 1944 (5 U.S.C. 863) and fully exhausted any administrative right of appeal he had before the U. S. Civil Service Commission, which said Commission held that his appeal should be in all things denied and sustained the action of the officials of the Housing and Home Finance Agency in discharging him on the basis of the charges filed against the plaintiff.

8. The plaintiff further alleges that in his appeal to the said U. S. Civil Service Commission he furnished undisputed evidence to the effect that his charges against the said officials outlined in the letter of December 29, 1953, were true and that they were made in good faith and in an honest endeavor to report the activities of officials in a Hohólulu, T. H., office, but that the said

U. S. Civil Service Commission did not adjudicate his appeal based upon the premise that he had made an honest and good faith report of the activities of the officials in his letter of December 29, 1953, but solely upon the ground that the entire burden of proof was upon the plaintiff to conclusively prove that each and every one of the charges made in the plaintiff's letter of December 29, 1953, was substantiated by conclusive proof, and the said U. S. Civil Service Commission arbitrarily and capriciously determined that it was fully incumbent upon the plaintiff to prove each and every charge in his letter of December 29, 1953, instead of considering whether the charges were made in good faith and in accordance with the assurances that the plaintiff had had from high officials of the United States Government, including the President of the United States, hereto referred to in this petition.

9. The plaintiff further alleges that the charges based upon his report to the said investigator J. A. Woods were made in the course of an investigation by the said Woods of the charges which the plaintiff had filed, and that any evidence contained in the said alleged charges numbered 1, 2, 3, and 4, on pages 4-5 of this petition were given during the course of an official investigation and such information given by the plaintiff to the said investigator J. A. Woods was highly privileged and cannot be legally made the basis of charges against the plaintiff, but they were considered as proper charges against the plaintiff by the United States Civil Service Commission in adjudicating his appeal, and this action was arbitrary, capricious and contrary to the rules of law relating to testimony given before an investigator who was making a report for consideration of the superiors of the plaintiff in Washington, D. C., but that in truth and fact the report of the plaintiff to the said investigator was in all things true.

10. The plaintiff further alleges that in his appeal before the United States Civil Service Commission he

furnished a twenty-four page affidavit which sets forth fully competent evidence to sustain all of the charges that the petitioner had made in his letter of December 29, 1953, but all such evidence was completely ignored by the United States Civil Service Commission.

11. The plaintiff further alleges that while in its consideration of the charges filed against the plaintiff, the United States Civil Service Commission held that he must fully and completely sustain every charge against the officials made in the letter of December 29, 1953, the evidence contained in the file before the said Commission was so overwhelming that certain charges were found to be fully sustained.

12. The plaintiff further alleges that the said United States Civil Service Commission in adjudicating his appeal in sustaining the charges filed against the plaintiff throughout their whole decision relied upon and referred to statements of the plaintiff made to the investigator Woods and in so considering the said statements which were highly privileged the action of the said officials of the said Civil Service Commission was arbitrary, capricious and deprived the plaintiff of a fair hearing before the said Commission. That in also determining the plaintiff's appeal before the said Civil Service Commission it was stated that the officials of the Commission would not substitute their judgment for the judgment of the superiors of the plaintiff and in declining to do so their action was arbitrary and capricious. Plaintiff further alleges that his appeal was denied by the United States Civil Service Commission based upon the consideration of incompetent and irrevelant evidence and statements made by the plaintiff to the said investigator Woods which was highly privileged and could not be referred to in adjudicating the plaintiff's appeal.

13. The plaintiff further alleges that he instituted a suit in the United States District Court for the District

of Columbia against Albert M. Cole, the Administrator of Housing and Home Finance Agency, and other officials and that a judgment was entered against him in the said District Court and thereupon the plaintiff appealed to the United States Court of Appeals for the District of Columbia and such proceedings were had that on May 8, 1959, a decision was rendered against him by the said Court of Appeals, solely upon the grounds that the procedural requirements relating to the dismissal of the plaintiff from his job were complied with. However, the said Court of Appeals appended to their decision the following note:

> "The record is not sufficiently clear to preclude a decision on the merits. Thus, we do not here dismiss"

and there was no decision on the merits of the plaintiff's claim or any adjudication as to whether the officials of the Housing and Home Finance Agency or the U. S. Civil Service Commission were arbitrary, capricious or their action was contrary to the evidence presented by the plaintiff.

14. Plaintiff further alleges that at the time of his separation from his government position on August 27, 1954, he was receiving a salary of $7128.00 per annum, and that from that period to the date of filing of this petition he has earned the sum of $1529.50 and that there is now justly due and owing to him by reason of his illegal and unlawful discharge the sum of $33,859.60.

That there will accrue to the plaintiff during the pendency of this action further additional sums of money.

15. Plaintiff further alleges that he is the sole owner of said claim and that no part of the claim has been assigned to any person, persons, firm, or corporation whatsoever. Plaintiff further alleges that his claim is not pending at this time before any agency or bureau of the government and that he has diligently prosecuted

his claim since the date that he was illegally separated from his position.

WHEREFORE, the plaintiff prays:

1. That the plaintiff, Francis D. Houston, have and recover from the defendant a judgment in the sum of $33,859.60, plus such other and further amounts as may be due him on the date of judgment herein.

CLAUDE L. DAWSON,
Attorney for the Plaintiff
1049 Shoreham Building,
Washington 5, D. C.

* * * * *

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant moves for summary judgment on the ground that there exist no substantial issues of material fact and defendant is as a matter of law entitled to judgment.

In support of its motion defendant relies on the pleadings as filed, upon its memorandum accompanying this motion and upon the exhibits annexed thereto.

IN THE UNITED STATES COURT OF CLAIMS

No. 342-59

(Decided January 12, 1962)

FRANCIS D. HOUSTON v. THE UNITED STATES

Claude L. Dawson for plaintiff.

Frances L. Nunn, with whom was *Assistant Attorney General William H. Orrick, Jr.*, for defendant.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PER CURIAM: Plaintiff brings this suit under section 14 of the Veterans Preference Act (58 Stat. 387, 390; 5 U.S.C. § 863) for loss of pay for his alleged wrongful discharge. Defendant, after having answered denying the crucial allegations of the petition, filed a motion for summary judgment, on the ground that there is no genuine issue as to any material fact, and that plaintiff is not entitled to recover as a matter of law. It says he is not entitled to recover as a matter of law for two reasons: first, that he is collaterally estopped by a judgment of the District Court for the District of Columbia, affirmed on appeal by the Court of Appeals; and, second, that the action of the Civil Service Commission in upholding his discharge is final, in the absence of a showing that this action was arbitrary, capricious, or otherwise unlawful, and that there is no such showing.

Plaintiff replies that his suit is not barred by collateral estoppel, because, he says, the issue presented to, and decided by, the District Court and the United States Court of Appeals was not the same as the issue here, and that there were no findings of fact by the District Court.

Second, he says that the action of the Civil Service Commission was arbitrary and capricious, because it held that the failure of plaintiff to prove the charges he had made justified his dismissal; that some of the charges were based on information he had given an inspector investigating the case, and that this was privileged; and that there was no substantial evidence to support the findings and decision of the Commission.

We do not think defendant's motion based on collateral estoppel can be sustained. Plaintiff's complaint in the District Court was based alone on procedural defects. There was no allegation that the findings of the Civil Service Commission were arbitrary or capricious or otherwise unlawful. The judgment of the District Court did not assign any reason for dismissing plaintiff's complaint. The *per curiam* opinion of the Court of Appeals merely said: "There is nothing to suggest that he had in any wise been overreached,[1] or that there has been such a denial of procedural benefits as appellant might have been entitled to receive." In a footnote it is stated: "The record is not sufficiently clear to preclude a decision on the merits. Thus, we do not here dismiss." [sic]

It is clear the case was not considered on its merits. In the case here, plaintiff attacks the findings of fact and law of the Civil Service Commission, upholding his discharge, and says they were not supported by substantial evidence or were otherwise arbitrary and capricious. It seems clear plaintiff is not collaterally estopped to maintain this suit.

In order to pass upon plaintiff's allegation of arbitrary or capricious action by the Civil Service Commission it will be necessary for us to state some of the facts.

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[1] Plaintiff claimed that he was dissuaded by defendant's agents from insisting on an oral hearing before the Board of Appeals and Review of the Civil Service Commission.

Plaintiff was the chief of the Appraisal Section of the Federal Housing Administration in Honolulu. George V. Whisenand was the Chief Underwriter, and J. Stowell Wright was the Director and in charge of the agency. Both men were plaintiff's superiors.

For some reason--just what is not clear--plaintiff asked Wright's superior, the Director of Region V in San Francisco, of which Honolulu was a part, to send out an investigator to inquire into the conduct of Chief Underwriter Whisenand. An inspector by the name of Woods was sent out from that office. When Woods contacted plaintiff, he made some very serious charges, not only against Mr. Whisenand, but also against Director Wright. These charges, as set out in Woods' report, may be summarized as follows: Both Wright and Whisenand are incompetent to hold their positions. While Mr. Wright is honest, he is gullible, and Mr. Whisenand is a liar and a cheat. Both men have been aggressively and continually building up a case against plaintiff. The valuation section, of which plaintiff was the head, has been by-passed; their reports have not been included in the file of the case or have been reworked. Mr. Whisenand associated with people "communistically inclined", and Mr. Wright failed to report that a Mr. McCurry was a sexual pervert, of which fact he had knowledge.

Mr. Woods made an extensive investigation of the charges and on January 4, 1954, made his report to the Assistant Commissioner, Underwriting, of FHA, completely exonerating both Wright and Whisenand. After setting out the charges plaintiff had made to him against Wright and Whisenand, Mr. Woods commented on each charge, and, in conclusion, said in part:

> 1. There is no evidence to justify an allegation of incompetency against either Director Wright or Chief Underwriter Whisenand.
>
> • • • •

> 8. There is no evidence, and no valid reason to believe, that either Mr. Wright or Mr. Whisenand is a liar or cheat. These gentlemen deserve complete confidence in their competency, honesty and integrity.

Before this report had been reduced to writing, but perhaps after the nature of it had been disclosed to Mr. Wright, he placed plaintiff on enforced leave. Thereupon, on December 29, 1953, plaintiff wrote a letter to the Administrator of the FHA in Washington, in which he stated he had been placed on annual leave by the Director, and that he assumed that this was caused by his statement to Mr. Woods that he intended to prefer charges against Wright and Whisenand, "the proving of which would automatically show them to be unfit to hold their present offices." His letter proceeds:

> Those charges, but only in part, are set forth below.
>
> Mr. Wright is unfit to hold his office because—
>
> 1) His record during the six years that I know of has been characterized by shameful indolence, gross neglect of duty, incredible gullibility [sic], and the exercise of authority in an arbitrary, capricious and abusive manner.
>
> . . . . .

He enumerates four other charges, among which were the withholding of pertinent information about an employee suspected of being a security risk and the misuse of public funds.

With respect to Mr. Whisenand he said he was a "liar and a cheat", that he had conducted a campaign of villification against plaintiff built entirely on falsehoods, and he made other charges against him.

Shortly after receipt of Mr. Woods' report, the Director of Personnel of FHA wrote plaintiff, notifying him that it was proposed that he be separated from the service, because he had made these charges against his superiors, which had not been sustained on investigation.

This initial step in the separation process was set aside by the Civil Service Commission, because the charges were not sufficiently specific, but about six months later, on July 8, 1954, following plaintiff's reinstatement, specific charges were preferred. These charges were that plaintiff had made the charges against Wright and Whisenand, as contained in his letter above referred to, and further that he had made four of the eight charges detailed by Mr. Woods in his report. It was further charged that plaintiff had been unable to sustain the charges made, and that they could not be sustained. For this reason it was proposed to dismiss him.

In due course plaintiff was discharged. He took an appeal to the Civil Service Commission. The Commission heard a number of witnesses pro and con and later decided the case on its merits. The Twelfth Region held that the agency was justified in discharging plaintiff. The Board of Appeals and Review affirmed on appeal without opinion.

This decision is conclusive unless it was, for some reason, contrary to law or was arbitrary or capricious, as shown by the fact that it was not supported by substantial evidence, or in some other way. *Kenny* v. *United States*, 134 Ct. Cl. 442, *cert.* denied 352 U.S. 893; *Armand* v. *United States*, 136 Ct. Cl. 339; *Adams* v. *United States*, 137 Ct. Cl. 52; *Thompson* v. *United States*, 145 Ct. Cl. 200.

If we assume that the predicate laid down by the Commission for its decision, as set out therein, is correct, it is not possible to say that its action was arbitrary or capricious, for the Commission evidently gave careful, detailed, and unbiased consideration to the case, and a review of the record clearly shows there was substantial evidence to support its findings.

We are, however, somewhat troubled by the "principles on which" the Commission said, "our review and our decision in this case are based * * *."

We wish we could set out the Commission's full statement of the principles upon which it based its decision, but it is too long. We must content ourselves with quoting the following two paragraphs:

> The issue in this case is quite clear in spite of the difficulty in determining whether the appellant has proved his specific charges. The appellant accuses two supervisors of serious indiscretions. The agency, in reply to his charges, has in effect said the charges he has made were not substantiated after investigation by an agency official. The agency has, as a result of this determination, preferred charges against the appellant *for apparently having falsely accused his supervisors.* The charges brought by the appellant seriously reflect on the integrity and/or administrative ability of both supervisors. *It is quite apparent, if we do not believe the appellant has sufficiently carried his burden of the evidence, that his removal is justified.*
>
> In matters such as this, where the agency has charged its employee *with bringing unsupported and unsupportable charges against a supervisor, the burden of proof rests on the appellant to show the charges he has made are true,* and further, it is encumbent upon such an appellant to provide us with the evidence on which he has based his charges. We are not required to accept from the appellant general allegations, with the implication that we are to investigate to determine whether the allegations are true or false. On the contrary, we believe that *in order to show good faith, the appellant should be possessed of all the evidence necessary to prove his case at the time he made his allegations against his supervisor or supervisors.* [Italics ours.]

It will be seen that the Commission took the position that in order for plaintiff to prevail, he must show that the charges he made against his superiors were true.

If the proceedings before the Commission had been a suit for slander or libel, it may be that the Commission's statement of principles was in error. A Government em-

ployee who honestly believes that he has information of misconduct on the part of a fellow employee, whether his superior or not, that is injurious to the public interest, and has a reasonable basis for that belief, may, if he acts in good faith and not maliciously, divulge his information to the proper official, without liability for slander or libel if the information turns out to be incorrect. Newell, Slander and Libel (4th Ed.) sections 421, 422, 432; *Washington Times Co.* v. *Bonner*, 86 F. 2d 836; *Hamilton* v. *United States Pipe & Foundry Co.*, 213 F. 2d 861; *Hodgkins* v. *Gallagher*, 122 Me. 112, 119 Atl. 68; *Sinclair Refining Co.* v. *Fuller*, 190 Ark. 426, 79 S.W. 2d 736; *Peoples Life Ins. Co.* v. *Talley*, 166 Va. 464, 186 S.E. 42.

But whether the facts in this case bring it within the privilege, as above defined, we do not need to decide. The action before the Commission was not one for slander or libel, but one to determine whether or not plaintiff's discharge promoted the efficiency of the service. The question is, was the Commission, in such a proceeding, justified in saying that the employee's inability to sustain the grave charges he had made against his superior justified his dismissal. On this issue, in concluding its 25-page opinion, the Commission said:

> As indicated on page 3 of this analysis, we are of the opinion that the burden of proving his charges against both supervisors rested upon appellant. Since we believe Mr. Houston failed to sustain his allegations against Mr. J. Stowell Wright, we are forced to conclude the Federal Housing Administration was justified in removing him: *In arriving at our conclusion we considered the seriousness of the charges preferred by appellant against his superiors, and we think the failure to prove the charges is indicative of a serious lack of judgment and total disregard for respect for authority on appellant's part.* [Italics ours.]

The task of this court is not to say whether or not we think this to be a sound conclusion; our task is to decide

whether it is erroneous as a matter of law, or arbitrary or capricious. Congress has vested in the Civil Service Commission jurisdiction to determine whether the rights of employees to their jobs have been infringed; not in us. We can only interfere when the Commission acts contrary to law or arbitrarily or capriciously.

Congress has said in section 14 of the Veterans Preference Act, *supra*: "No permanent or indefinite preference eligible * * * shall be discharged * * * except for such cause as will promote the efficiency of the service * * *." It has set up the Civil Service Commission to see that this injunction is obeyed. This Commission has said that where an employee charges his superior with being "unfit to hold his office" because his record in office has been characterized "by shameful indolence, gross neglect of duty, incredible gullibility [sic], and the exercise of authority in an arbitrary, capricious and abusive manner," and then cannot prove these charges after an inspector has been sent out to investigate them, and after a full hearing before the Civil Service Commission, in such case, the Commission has said that the discharge of such an employee will promote the efficiency of the service.

Can we say that this decision was erroneous as a matter of law, or was arbitrary or capricious? We cannot. What law does it violate? Why is it arbitrary or capricious? We may disagree with it, but it is not so unreasonable as to be a mere whim or caprice.

That is the first question this court must decide: Was it contrary to law or arbitrary or capricious? Having decided that question in the negative, we have no jurisdiction to inquire into the matter further.

Defendant's motion for summary judgment will be granted, and plaintiff's petition will be dismissed.

It is so ordered.

X. Order of the court overruling plaintiff's motion for rehearing.

ORDER

These cases come before the court on motions, rehearings, reconsideration or new trial under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this seventh day of March, 1962, that said motions be and the same are overruled as follows:

* * * * *

342-59 Francis D. Houston. Plaintiff's motion.

* * * * *

BY THE COURT

/s/ Marvin Jones
MARVIN JONES
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

No. 342-59.

FRANCIS D. HOUSTON,

v.

THE UNITED STATES.

I, Frank T. Peartree, Clerk, United States Court of Claims, do hereby certify that the foregoing are true transcripts of the petition, defendant's answer, defendant's motion for summary judgment, plaintiff's brief in opposition to defendant's motion for summary judgment, defendant's response to plaintiff's brief in opposition to defendant's motion for summary judgment, opinion of the court, per curiam, on defendant's motion for summary judgment, plaintiff's motion for reconsideration, supplemental statement of the plaintiff to his motion for rehearing, defendant's opposition to plaintiff's motion for reconsideration, and the order of the court overruling plaintiff's motion for rehearing, in the above entitled case.

[SEAL] IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court this 24th day of May, A. D., 1962.

/s/ Frank T. Peartree
FRANK T. PEARTREE, Clerk,
United States Court of Claims.